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March 14, 2002

VIA ECFS and UPS Next Day Air

William F. Caton, Acting Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers
CC Docket No. 01-338

Dear Mr. Caton:

Enclosed for filing in the above referenced matter please find one original and four copies of the Comments of the Massachusetts Department of Telecommunications and Energy. Kindly stamp one copy and return it to us in the enclosed stamped, self-addressed envelope. Additionally, the Comments are also being filed electronically through ECFS.

Sincerely,

/s/

Paul G. Afonso
General Counsel

cc: Qualex International (electronically and by paper)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Commonwealth of Massachusetts
Department of Telecommunications and Energy

James Connelly, Chairman
W. Robert Keating, Commissioner
Paul B. Vasington, Commissioner
Eugene J. Sullivan, Jr., Commissioner
Deirdre K. Manning, Commissioner

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COMMENTS OF
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

The Massachusetts Department of Telecommunications and Energy ("MDTE") hereby submits these comments pursuant to the Notice of Proposed Rulemaking ("Notice"), released by the Federal Communications Commission ("FCC") on December 20, 2001, in CC Docket No. 01-338. In the Notice, the FCC requests comments on the circumstances under which the incumbent local exchange carriers ("ILECs") must make parts of their networks available to requesting carriers on an unbundled basis pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 ("the Act"). In these comments, the MDTE focuses on two sections of the Notice: the section addressing the role of the states in unbundling decisions (paras. 75-76), and the section that discusses the relationship between the unbundling rules and the promotion of facilities-based investment and broadband deployment (paras. 22-25). To

summarize, the MDTE makes two recommendations. First, the FCC should allow states to expand upon or delete from the list of unbundled network elements ("UNEs") that ILECs are required to offer to competitors. Second, the FCC should ensure that its unbundling rules encourage efficient competition and efficient choices between facilities-based and UNE-based business plans.

I. INTRODUCTION

In its Notice of Proposed Rulemaking on Unbundling Obligations of ILECs[1], the FCC states its intention to perform a comprehensive evaluation of its unbundling rules in light of the changes in market conditions over the past five years, and the experience gained since the unbundling rules were first instituted. Triennial Review at ¶ 1-2. The FCC's Notice further highlights the FCC's intention to focus on the facilities used to provide broadband services and

[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. December 20, 2001) ("Triennial Review").

explore the role that wireless and cable companies have begun to play in the market. Id. at ¶ 3. In addition, the Notice states that the FCC seeks through its unbundling rules to promote market entry not only by fully facilities-based carriers but also by those facilities-based carriers that purchase UNEs. Id.

The MDTE submits these comments reflecting the lessons learned in Massachusetts. The MDTE emphasizes the value of input by the states into unbundling requirements, and urges the FCC to expand the states' role in local unbundling decisions. In addition, the MDTE underscores the need for appropriate regulatory treatment of UNEs that are used to provide advanced services, in order to allow competitors to make efficient decisions as to the most efficient means of market entry.

II. THE ROLE OF THE STATES IN UNBUNDLING

The FCC's unbundling rules should allow states to expand upon or delete from the list of UNEs that ILECs are required to offer to competitors. See Triennial Review at ¶ 75-76. States should be able to do so by request from a carrier (including the ILEC), or on a state's own motion. States are better able to judge the appropriateness of a particular UNE in light of local market conditions and can be more responsive to changes in those conditions. Each state has a unique interest in the availability of UNEs in that state because of the effect on competition and investment in that state and ultimately the state's economy.

The current rules allow states to add to the UNE list. 47 C.F.R. § 51.317(d). States should continue to be able to add UNEs to the ILEC unbundling obligations. Indeed, the MDTE has availed itself of this right in the past. In 1996, the MDTE made a determination that dark fiber

was an essential part of Massachusetts local exchange service, and added dark fiber to the unbundling obligations of the ILEC before the FCC required dark fiber to be unbundled. Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 3, at 42-50 (1996).

In addition, the states should be able to identify whether UNE-P[2] should be made available in a particular state. See Triennial Review at ¶ 45-46 (limit availability of UNE-P when certain triggers are met). The MDTE has ruled on the availability of UNE-P in the past, and should be able to revisit that ruling as market conditions warrant. See Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4-P at 7 (2000) (requiring Bell Atlantic to file a tariff making the UNE-P combination available, including terms, conditions, and all applicable charges).

[2] The MDTE refers to a combination of loop, switching, and transport network elements as UNE-P or UNE-platform.

States should also be allowed to remove UNEs from the list of network elements that the ILEC is required to unbundle. See Triennial Review at ¶ 75. Such state-by-state action would be consistent with the goals of the Act. Under the current rules, states may not delete network elements from the list of required UNEs. 47 C.F.R. § 51.317(d). However, the reasons cited by the FCC in its decision not to allow states to remove UNEs from the unbundling requirements in its UNE Remand Order[3] are no longer valid. The FCC and the states have gained experience over the past six years with unbundling such that appropriate guidelines could be established. In addition, competitive local exchange carriers ("CLECs") have had six years since the Act went into effect to establish their networks, and those networks are more mature than they were at the time the FCC's unbundling rules were established. Finally, allowing states to add and delete network elements from the unbundling requirements fits with the FCC's more "granular" approach to unbundling rules. Triennial Review at ¶ 34.

The FCC should develop a default list of UNEs, which states can then adjust to local conditions. The states should have the option to make unbundling decisions, or to accept the FCC's default list. The FCC should also provide guidelines on the factors to be assessed when applying the "necessary" and "impair" statutory standard for adding/deleting UNEs. The FCC has extensive experience in this area, and national standards would ensure a more uniform standard of review in implementing unbundling requirements. The FCC should place the burden on a

[3] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. November 5, 1999) ("UNE Remand Order").

proponent to show that a particular network element should be added or deleted from the unbundling requirements, and that burden should be sufficiently strict to discourage spurious petitions for relief from or additions to the unbundling requirements.

States have authority to alter the list of UNEs available in a particular state. Section 251(d)(3) allows states, among other things, to implement access obligations of local exchange carriers, as long as those requirements are consistent with the Act. 47 U.S.C. § 251(d)(3). The FCC should make it clear that, when a state makes an unbundling determination, as long as that state follows the standards established by the FCC, its addition or deletion of unbundled network elements is not "[in]consistent with the requirements of [section 251]" nor does that determination "substantially prevent implementation of the requirements of [section 251] and the purposes of [Part II, addressing development of competitive markets]." 47 U.S.C. § 251(d)(3).

III. PROMOTION OF FACILITIES-BASED INVESTMENT AND BROADBAND DEPLOYMENT THROUGH THE UNBUNDLING RULES

The FCC's unbundling rules should encourage efficient information for CLECs to choose between facilities-based, UNE-based, or resale competition. The MDTE makes The following recommendation to achieve this result. The unbundling rules should continue to require ILECs to unbundle network elements, including network elements that provide advanced services, and the pricing of those elements should account for the varying risk and opportunity cost associated with investment in those elements experienced by the ILECs. As long as the economic foundation of the pricing of UNEs accurately reflects forward-looking costs and risks, unbundling should not provide a disincentive to competition or to investment.

The FCC requested commenters to discuss the role that investment in new facilities has

played over the last five years. Triennial Review at ¶ 25. Regarding investment, the FCC has found that industry investment in infrastructure to support high-speed and advanced services is strong and has increased dramatically since 1996.[4] However, the FCC should review the relationship of UNE pricing and facilities investment. The MDTE recommends that the FCC assure that its pricing rules allow ILECs to account for opportunity costs and risks associated with investment in advanced technologies, which may be different than the costs and risks for plain old telephone service or even for today's advanced services, such as DSL. See Triennial Review at ¶ 24. Regarding the relationship between ILEC unbundling requirements and investment in facilities, ILECs should not object to unbundling as long as they earn a return on their investment that accounts for their risk appropriately, and their depreciation schedules match market realities. The MDTE has already designed existing UNE rates to reflect the risk ILECs face in providing wholesale services. See Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4 (1996). The MDTE's UNE rates were set with reference to a cost of capital that reflects a competitive market, and depreciation rates that incorporate forward looking projection lives. Id. at 37-56.

[4] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Third Report, FCC 02-33, at ¶ 62 (rel. February 6, 2002).

IV. CONCLUSION

In closing, the MDTE urges the FCC to allow states to expand upon or delete from the list of UNEs that ILECs are required to offer to competitors. In addition, the FCC's unbundling rules should encourage efficient competition and efficient choices between facilities-based, UNE-based, and resale business plans. By doing so, the MDTE maintains, the goals of the Act's local competition provisions will be more quickly realized.

Respectfully submitted,

Commonwealth of Massachusetts
Department of Telecommunications and Energy

By:

_____/s/_____
James Connelly, Chairman

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
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